

USDOL/OALJ Reporter

[*Gutierrez v. Regents of the University of California*](#), ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB CASE NO. 99-116
ALJ CASE NO. 98-ERA-19
DATE: November 13, 2002

In the Matter of:

JOE GUTIERREZ,
COMPLAINANT,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Carol Oppenheimer, Esq., *Simon, Oppenheimer & Ortiz, Santa Fe, Mexico*

For the Respondent:

Ellen Cain Castille, Esq., *Los Alamos National Laboratory, Los Alamos, New Mexico*

FINAL DECISION AND ORDER

This case arises out of a complaint Joe Gutierrez filed claiming that his employer, Los Alamos National Laboratory ("LANL" or "Laboratory"), violated the employee protection (whistleblower) provision of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851 (1994) ("ERA" or "Act") when it added a negative comment to his performance evaluation and gave him a reduced pay increase in 1997. After a formal hearing, an Administrative Law Judge ("ALJ") issued a Recommended Decision and Order finding that LANL violated the Act and recommending relief for Gutierrez. The ALJ subsequently issued a Recommended Decision and Order recommending the approval of attorneys' fees and costs.¹ We concur in the ALJ's holding that LANL violated the Act and **AFFIRM** the ALJ's recommendation of a retroactive 4% salary increase, reimbursement of used vacation days, expungement of the negative comment

from the performance evaluation, and an award of attorneys' fees and costs in the amount of \$49,104.37.² However, we **REVERSE** the ALJ's recommendation of compensatory damages for emotional distress.

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BACKGROUND

At all times relevant to this decision, the Regents of the University of California operated LANL for the U.S. Department of Energy. AEX 18, § 3(1). Gutierrez worked for LANL as an assessor within the Office of Audits and Assessments ("OAA"). AEX 18, § 3(3). Independent of line management, the OAA provided LANL management with evaluations of the status of environmental, safety, health, security and quality assurance programs within the Laboratory complex. R.D.&O., slip op. at 4; TR 825.

Gutierrez worked in OAA's Internal Assessments Group AA-2. Group Leader Dennis Derkacs supervised Gutierrez until February 1997. Group Leader James Loud supervised him beginning in March 1997. REX W at 4-5; TR 974. As a member of OAA's Internal Assessment Group AA-2, the Complainant helped to assess LANL's organization, functions and facilities. CEX 14 at 2. Because of Gutierrez's expertise in the quality assurance area, he had significant responsibilities on the assessments. REX W at 19, 22; TR 55.

In October 1996, Gutierrez prepared a statement that outlined his concern that LANL was not complying with required quality assurance policies. CEX 27. Gutierrez claimed that OAA's assessments lacked independence and that management did little to scrutinize LANL's practices. CEX 27 at 3. The Complainant asserted, among other things, that LANL was in violation of the Clean Air Act. CEX 27 at 9. Gutierrez had his statement notarized and distributed it to Citizens Concerned for Nuclear Safety, Senator Jeff Bingaman and Congressman Bill Richardson. TR 139.

Although Gutierrez did not provide a copy of his statement to the press, he did expect reporters to interview him regarding its contents. TR 383. He spoke with a reporter from the *Santa Fe New Mexican* concerning the shortcomings he perceived in LANL's internal assessment program. TR 141-43. The October 28, 1996 issue of the *Santa Fe New Mexican* contained an article with Gutierrez's contention that LANL's internal audits and assessments process was not independent. CEX 10. The January 15-21, 1997 edition of the *Santa Fe Reporter* carried the Complainant's claim that LANL was not in compliance with the CAA (TR 144-5, 151-52; CEX 11) and the January 15, 1997 edition of the *Albuquerque Journal North* quoted Gutierrez's concerns about the lack of adequate monitoring at the LANL (TR 152-54; CEX 12). In 1996, Gutierrez also advised a Department of Energy official of a possible leak in one of LANL's plutonium facilities. TR 464-65.

Press reports of Gutierrez's statements disturbed program managers at LANL, who felt it was inappropriate for Gutierrez to reveal this type of information publicly. R.D. &O.,

slip op. at 27-31. These managers put pressure on the AA-2 Group Leader to exclude the Complainant from future internal audits of their areas. *Id.* In response to this pressure, Team Leaders did not assign Gutierrez to some assessments. TR 542. AA-2 Team Leader James Griffin testified that he removed him from an assessment. TR 542. AA-2 Team Leader Nathaniel King said at the hearing that he prevented Gutierrez's involvement in one or two assessments. TR 600-01. AA-2 Team Leader John Carl Frostenson stated that he excluded the Complainant from one assessment. TR 733. Loud testified that, at the time he became AA-2 Group Leader, Gutierrez was not participating in an assessment on which all the other members of the Group were working. TR 984. Within a month or two, reasoning that the subjects of OAA's independent audits could not dictate who would evaluate them, Loud resumed sending Gutierrez on internal audits. TR 987-88.

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On August 8, 1997, Loud gave Gutierrez his Employee Performance Assessment that Loud had prepared. TR 1031. The Evaluation Matrix of the Employee Performance Assessment showed Gutierrez's performance as Fully Satisfactory in six of seven job factors and Exceptional in the Technical/Programmatic Management job factor. In the section that was reserved for comments required for exceptional performance, performance needing improvement or unsatisfactory performance, Loud wrote:

There was some unfavorable customer feedback [*i.e.*, from LANL managers whose programs Gutierrez had assessed] during this period regarding the unrestricted distribution of some of Joe's assessment issues. Since Joe routinely works with customers in sensitive and service oriented fashion, I am confident that the trust and confidence of these and other customers can be reestablished through the use of new and existing AA/Laboratory's channels for issue escalation and resolution. I look forward to working with Joe to use these systems to enhance the Laboratory's ability to identify and correct significant ES&H deficiencies.

CEX 14.

Gutierrez's Employee Performance Assessment was the first time LANL's management informed him of the "negative customer feedback" and the manner in which Loud conveyed it offended him. TR 155. Gutierrez and Loud exchanged memos regarding the Complainant's dissatisfaction with the comment on his Performance Assessment. CEX 14 at 11-12, CEX 15, 18, 19, 20. Loud emphasized the point made in the comment on the Performance Assessment when he added an August 27, 1997 note to the file that said:

My present concerns and my comments during our meeting [regarding the comment on the Performance Assessment] were related to media coverage referencing our internal assessment issues. Understandably our customers do not want to read their real and/or perceived deficiencies in media sources such as the Santa Fe Reporter. We need to be sensitive to these

customer concerns and avoid media interactions leading to such coverage of internal assessment issues.

CEX 15.

The ALJ found that Loud's adding an addendum to Gutierrez's Performance Assessment without resolving his concerns violated LANL's Administrative Manual. R.D.&O., slip op. at 59.

Based upon the Complainant's Performance Assessment, Loud recommended that Gutierrez receive a 2.75% salary increase (TR 1054), which Gutierrez believed was lower than it should have been. AEX 1. Loud calculated each employee's raise by first grouping together, in peer groups, all employees in his group who had the same Evaluation Matrix ratings. TR 1047. Loud placed Gutierrez in a peer group with two other employees who had six Fully Satisfactory Performance and one Exceptional Performance rating. TR 1052, 1055. Loud based his salary recommendation, within the peer group of three, upon performance and job content, with job content as the only objective difference between Gutierrez and the other two employees in his ratings peer group, who received 3.19% and 3.38% raises respectively. TR 1103.

Gutierrez filed a November 21, 1997 complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) claiming that LANL's addition of a negative comment to his Performance Assessment and its finalization of the Performance Assessment without giving him an opportunity to discuss the comment was retaliatory. CEX 1. He also complained that the Respondent gave him a lower than appropriate pay raise and told him not to discuss environmental, health and safety concerns with anyone "outside of appropriate and established avenues for such disclosures." *Id.* OSHA investigated Gutierrez's complaint and found that LANL had violated the Act. AEX 2. LANL appealed this finding and the case was referred to an ALJ for a formal hearing. AEX 4, 5.

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After the formal hearing, the ALJ issued the R.D.&O. holding that LANL had violated the Act. R.D.&O., slip op. at 61-62. The ALJ recommended that LANL: pay Gutierrez a 4% salary increase, reimburse Gutierrez five vacation days, expunge the negative portion of the Complainant's Performance Assessment, and pay Gutierrez \$15,000 in compensatory damages for emotional distress. R.D.&O., slip op. at 65-71. The ALJ subsequently recommended that the Respondent pay Gutierrez's attorneys \$49,104.37 in fees, costs and expenses. R.D.&O. II, slip op. at 5-6. LANL filed a timely appeal with this Board.

JURISDICTION

The ARB has jurisdiction to issue final orders under the employee protection provision of the Energy Reorganization Act, 42 U.S.C. § 5851(b) (1994), and the Department of Labor regulations. 29 C.F.R. § 24.8 (2002).³

STANDARD OF REVIEW

In reviewing the ALJ's recommended decision, the Board, as the designee of the Secretary, acts with "all the powers [the Secretary] would have in making the initial decision" 5 U.S.C. § 557(b) (1994). Accordingly, the Board is not bound by either the ALJ's findings or his conclusions of law, but reviews both *de novo*. See *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97-CAA-9, electronic slip op. at 15 (ARB Feb. 29, 2000) and the materials cited therein.⁴

ISSUES

1. Whether LANL violated the ERA by including negative comments in Gutierrez's Employee Performance Assessment and by limiting his pay increase to 2.75%.
2. Whether Gutierrez established his entitlement to compensatory damages for emotional distress.
3. Whether Gutierrez is entitled to his attorneys' fees award in the amount claimed.

DISCUSSION

I. Violation of the Energy Reorganization Act

A. Applicable Legal Standard

In order to prevail on a claim of discrimination under the Energy Reorganization Act, a complainant must establish by a preponderance of the evidence that the engaged in protected activity which was a contributing factor in the unfavorable personnel action alleged in the complaint. 42 U.S.C. § 5851 (b)(3)(C). The Act describes an unfavorable personnel action as a discharge or "discriminat[ion] against any employee with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 5851(a)(1).

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Under the Act, the whistleblower complainant must satisfy his initial evidentiary burden by showing that: (1) he engaged in protected conduct; (2) the respondent was aware of that conduct; (3) the employer took an unfavorable personnel action ("adverse action") against him. *Carroll v. U.S. Department of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Darty v. Zack Company of Chicago*, No. 82-ERA-2, electronic slip op. at 5 (Sec'y Apr. 25, 1983). To prevail on his ERA claim, the complainant must then prove by a

preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel decision. 42 U.S.C. § 5851(b)(3)(C). *See Trimmer v. U.S. Department of Labor*, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *Dysert v. Secretary of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997); *Dysert*, No. 82-ERA-2, electronic slip op. at 5; *McCuiston v. TVA*, No. 89-ERA-6, electronic slip op. at 3-4 (Sec'y Nov. 13, 1991); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983). "One way for a complainant to establish that his protected activities were a contributing factor in the adverse employment action is to show that the reason the respondent gave for taking the action was pretextual." *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24, electronic slip op. at 5 (Dep. Sec'y Feb 14, 1996).

If the ERA complainant meets his burden of proof, the respondent employer can avoid liability if it can prove "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [the employee protected activity]." 42 U.S.C. § 5851(b)(3)(D). *See Trimmer*, 174 F.3d at 1102; *Dysert*, 105 F.3d at 610; *Talbert v. Wash. Public Power Supply Sys.*, ARB No. 96-023, ALJ No. 93-ERA-35 (ARB Sept. 27, 1996); *Lassin v. Michigan State Univ.*, No. 93-ERA-31 (Sec'y Jun. 29, 1995); *Yule v. Burns Int'l Security Serv.*, No. 93-ERA-12 (Sec'y May 24, 1995).

We now discuss whether Gutierrez proved by a preponderance of the evidence that he engaged in protected activity that was a contributing factor in unfavorable personnel decisions, and whether LANL demonstrated by clear and convincing evidence that it would have taken the same actions in the absence of the protected activity.

B. Complainant's Protected Activity

We adopt the ALJ's ruling that Gutierrez established that he engaged in protected activity. R.D.&O., slip op. at 45. Gutierrez engaged in protected activity by publicly revealing information related to safety and health issues at the LANL. 42 U.S.C. § 5851(a)(1)(F); R.D.&O., slip op. at 45. He raised these issues in reports, as part of his job as an internal assessor. R.D.&O., slip op. at 45-46. He notified a Department of Energy official about leaks in LANL's plutonium facility. *Id.* at 46. He also provided copies of his October 7, 1996 statement to members Congress and Citizens Concerned for Nuclear Safety. *Id.* Gutierrez communicated with newspapers, which quoted his health and safety concerns in articles. *Id.* at 47.

C. Respondent's Knowledge

The Board adopts the ALJ's findings that Gutierrez also established that LANL officials were aware of his protected disclosures. R.D.&O., slip op. at 47-49. Gutierrez's comments regarding safety at LANL were quoted in three prominent New Mexico newspapers (CEX 10, 11, 12), and AA-2 Group Leader Loud, who prepared the Employee Performance Assessment at issue, and all the Team Leaders testified that they were aware of these articles. TR 533-34, 591-93, 595-97, 726-31, 979-80. We therefore adopt the ALJ's finding that Loud was aware of much of Gutierrez's protected activity. R.D.&O., slip op. at 47.

In addition, Gutierrez was excluded from performing assessments because of complaints based upon the newspaper articles. TR 542, 600-601, 733. All of Group AA-2's Team Leaders informed Loud of the negative feedback they received regarding Gutierrez's public statements. R.D.&O., slip op. at 47. Accordingly, we affirm the finding that the Respondent had knowledge of the Complainant's protected activities.

D. Respondent's Adverse Actions

We agree with the ALJ's conclusions that the Respondent's negative statements about the Complainant's protected activity in his performance evaluation and its subsequent limitation of his pay increase in 1997 were acts of reprisal and constituted discrimination in violation of the Act.

1. Negative Comment in Gutierrez's Performance Assessment

We first address the issue of whether a performance evaluation that, in essence, advises an employee to cease engaging in protected activity is an adverse action.

The Board has determined that commentary in a performance evaluation that does not implicate tangible job consequences is not actionable. *See, e.g. Ilgenfritz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 99-WPI-3, electronic slip op. at 8 (ARB Aug. 28, 2001) (performance evaluation citing areas for improvement and containing unflattering comments that did not lead to tangible job consequences such as reduced raise not adverse action); *Shelton v. Oak Ridge Nat'l Lab.*, ARB No. 98-100, ALJ No. 95-CAA-19, electronic slip op. at 8 (ARB Mar. 30, 2001) ("oral reminder" placed in personnel file and removed after six months not adverse action).

On the other hand, the Board has held that a portion of a performance appraisal may constitute an adverse action, even where the overall rating is satisfactory, if the evaluation is in retaliation for engaging in protected activity and can result in tangible consequences. *See, e.g., Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2, 5, 93-CAA-1, 94-CAA-2, 3, electronic slip op. at 19, 32 (ARB June 14, 1996) ("[T]he narrative contained in a performance appraisal may constitute adverse action, even if the ultimate rating does not;" however, the "evaluation accurately described [the complainant's] job performance, and therefore cannot be found to have been retaliatory."); *Boynton v. Pennsylvania Power and Light Co.*, No. 94-ERA-32, electronic slip op. at 4, 12 (Sec'y Oct. 20, 1995) (after engaging in protected activity, complainant received lower numeric rating and lower salary increase than peer group); *Bassett v. Niagara Mohawk Power Corp.*, No. 85-ERA-34, electronic slip op. at 3-4, 7 (Sec'y Sept. 28, 1993) (statement that complainant was "borderline" between "met expectations" and "did not meet expectations" and would have to improve or an unsatisfactory rating might result were sufficient to state adverse action element of *prima facie* case; but comment was not

retaliatory, because evidence showed "supervisors were dissatisfied with his lack of initiative and felt his performance could be improved.")

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Relying on *Varnadore* and *Bassett*, the ALJ held that the narrative contained in Gutierrez's performance appraisal constituted an adverse action, even if the ultimate rating did not, since the performance assessment was a factor in determining the Complainant's salary. R.D. & O., slip op. at 49-51. The ALJ concluded:

The comment regarding "unfavorable customer feedback" was included in Complainant's performance assessment, and Mr. Loud admitted that the performance assessment weighted heavily in making the salary determination. Thus, the comment did cause Complainant to suffer an adverse consequence.

R.D.&O., slip op. at 51.

We agree with the ALJ's reading of the record. The following factors persuade us that Loud's comment about "unfavorable customer feedback" in Gutierrez's Employee Performance Assessment and his appended August 27, 1997 note are adverse actions: 1) the comment and addendum do not address Gutierrez's job performance *per se*, but rather fault him for engaging in activity that is protected under the ERA; 2) the comment and addendum suggest that the Complainant could improve his performance, and consequently his pay, if he stopped his protected activity; 3) the comment and note became part of the Complainant's personnel record and could be consulted in making promotions and taking other personnel actions (R.D.&O., slip op. at 43, 50); 4) Loud failed to adhere to LANL's Administrative Manual when he added the note to Gutierrez's Performance Assessment without Gutierrez's signature (R.D.&O., slip op. at 59; *see Stoller v. Marsh*, 682 F.2d 971 (D.C. Cir. 1982) (reliance on discriminatory performance evaluation placed in employee's personnel folder before fair opportunity for review violated Title VII)); 5) LANL's policy and practice were to take comments in a Performance Assessment into account in determining an employee's pay increase (R.D.&O., slip op. at 54; TR 434, 449, 505); and 6) Loud did take Gutierrez's Performance Assessment and job content into account in making his salary determination (R.D. & O., slip op. at 60; TR 1099-1101). Accordingly, we hold that the "unfavorable customer feedback" comment was an unfavorable personnel action within the ERA.

2. The 2.75 % pay increase

We next examine the question of whether LANL limited Gutierrez's pay increase to 2.75% in 1997 in retaliation for his whistleblowing activities.

Gutierrez received a pay raise of 2.75%, while the two other workers in his ratings peer group who also had six Fully Satisfactory Performance and one Exceptional Performance

Rating received 3.19% and 3.38% raises. This disparity in all probability is evidence of unlawful discrimination. Moreover, the Respondent does not dispute that Gutierrez's protected disclosures were a contributing factor in his removal from internal audits. This in turn lead to diminished job content, which resulted in the reduced salary increase, because, as Loud testified, job content was the only objective difference between Gutierrez and the two other employees in his peer group. We adopt the ALJ's finding that "had not work been taken away from Complainant, he would have had a greater job content than that which was considered by Mr. Loud." R.D.&O., slip op. at 52-53. The diminished pay increase was an adverse action because it affected the "compensation, terms, conditions, or privileges of [his] employment" (42 U.S.C. § 5851(a)(1)), *i.e.*, Gutierrez received a lower raise than the other employees in his peer group. We affirm the ALJ's finding on the issue.

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E. Complainant's Proof that Protected Activity was Factor in Adverse Actions

Having reviewed the record, we hold that Gutierrez has demonstrated by a preponderance of the evidence that his protected activity was a contributing factor in the unfavorable personnel actions we have discussed. 42 U.S.C. § 5851(b)(3)(C). In reviewing the evidence, we have found the requisite causal nexus between Gutierrez's activities and the adverse actions. As the ALJ determined, Gutierrez's engagement in protected activity was the source of "customer" dissatisfaction, which caused him to lose assessment assignments, resulted in a lower Performance Assessment, and led to the diminished raise in his salary. R.D. &O., slip op. at 54, 61-62, 64-65.

F. Respondent's Failure to Prove it Would Have Taken Same Action

We turn to the Respondent's defense. Relief may not be ordered under the ERA if the employer "demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of [the protected activity]." 42 U.S.C. § 5851(b)(3)(D). We summarize and adopt the ALJ's reasoning and affirm the holding that LANL has failed to carry this burden. R.D. & O., slip op. at 62.

The ALJ concluded that LANL's stated reasons for including the "unfavorable customer feedback" comment on Gutierrez's Employee Performance Assessment and for awarding him a 2.75% pay increase were pretextual. R.D. & O., slip op. at 61-62. Although LANL admitted that it included the unfavorable comment in Gutierrez's Assessment it argues that this was done for the legitimate business purposes stated in its Administrative Manual, namely: 1) increasing dialogue between employees and their supervisors; 2) clarifying employee's job duties; and 3) identifying problems. The ALJ rejected this argument determining: "It is doubtful that Respondent was truly interested in increasing dialog, clarifying job duties or identifying problems, as no one at LANL spoke to Complainant about his actions until August 8, 1997." R.D. & O., slip op. at 57.

The ALJ also rejected LANL's other arguments, reiterated in Respondent's brief: that the comments in Gutierrez's Assessment were not adverse actions because the reflected positively on Gutierrez's ability to reestablish trust with OAA's customers; that the comment in the Assessment did not meet the ERA definition of an adverse action: that the comment was a proper statement of fact regarding "true" customer feedback; and that Gutierrez suffered no adverse consequences as a result of the comment in the Assessment. R.D. & O., slip op. at 49.

The Respondent assert that the 2.75% pay raise was based on job performance and job content (R.D. & O., slip op. at 52; TR 490), and Loud testified that he did not consider that the Complainant had fewer assessments during the rating period (TR 1113). However, the ALJ found that evidence unpersuasive, and noted that only the customer complaints and reduced workload could have accounted for the negative impact on Gutierrez's pay raise. R.D. & O., slip op. at 51-53.

The ALJ determined that Gutierrez's protected disclosures were a contributing factor in the removal of Gutierrez from internal audits which resulted in the diminished salary increase because Loud testified that job content was only objective difference between Gutierrez and the two other employees in his peer group and "had not work been taken away from Complainant, he would have had a greater job content then that was considered by Mr. Loud." R.D. & O., slip op. at 52-53.

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The ALJ noted in addition that Loud failed to adhere to LANL Administrative Manual, when he added an addendum to Gutierrez's Performance Assessment without Gutierrez's signature, and that this failure to adhere to LANL performance assessment policies was further evidence of pretext. R.D. & O., slip op. at 59.

The ALJ thus ruled that LANL had not demonstrated by clear and convincing evidence that it would have taken the same action in the absence of Gutierrez's protected disclosures. R.D. & O., slip op. at 57-59, 61-62. We concur in the determination that the Respondent violated the Act (*Id.* at 61-62), and the issued then becomes what remedies and damages should be awarded.

F. Backpay Calculation and Other Relief

We adopt the ALJ's analysis and findings on the backpay award and certain other relief, except for compensatory damages for emotional distress. The ALJ recommended that LANL pay Gutierrez a 4% salary increase, R.D. & O., slip op. at 65-67. He noted that, for the fiscal year in question, the Department of Energy had authorized LANL to increase the technical staff member payroll by 4%. *Id.* at 66. The ALJ found that LANL managers determined each individual's salary increases by weighing several factors that could not be reduced to a precise mathematical formulation (*Id.* at 66), and that there was considerable variability among employees in the same peer group. *Id.* at 65. The ALJ

found that Loud had failed to take into consideration all of Gutierrez's duties during the relevant assessment period and that his protected activities resulted in fewer duties. *Id.* at 66. In light of all these factors and that "uncertainties in determining what an employee would have earned but for discrimination, should be resolved against the discrimination [party]," the ALJ concluded that a 4% pay raise would restore Gutierrez to the same position he would have been in had there been no discrimination. *Id.* at 64-65 (citation omitted).

We also adopt the recommendation that LANL: reimburse Gutierrez five vacation days (*Id.* at 67), and expunge the negative portions of the Complainant's Performance Assessment (*Id.* at 71).

II. Failure to Establish Compensatory Damages

However, for reasons we now discuss, the Board reverses the ALJ's recommended award of compensatory damages for emotional distress in the amount of \$15,000. In addition to the other remedies specified above, 42 U.S.C. § 5851(b)(2)(B) authorizes the Secretary to award compensatory damages. *Deford v. Sec'y of Labor*, 700 F.2d 281, 288 (5th Cir. 1983). Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. *Thomas v. Arizona Public Service Co.*, No. 89-ERA-19, electronic slip op. at 14 (Sec'y Sept. 17, 1993).

To recover compensatory damages under the Act, a complainant must show by a preponderance of the evidence that he or she experienced mental suffering or emotional anguish and that the unfavorable personnel action caused the harm. *Cf. Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992), *citing Carey v. Piphus*, 435 U.S. 247, 263-64 and n.20 (1978). The circumstances of the case and testimony about physical or mental consequences of retaliatory action may support such awards. *Lederhaus v. Paschen & Midwest Inspection Servs., Ltd.*, No. 91-ERA-13, electronic slip op. at 7-8 (Sec'y Oct. 26, 1992). The testimony of medical or psychiatric experts is not necessary, but it can strengthen a complainant's case for entitlement to compensatory damages. *Id.* at 7.

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Based upon the facts of this case, we rule that Gutierrez has not established his entitlement to compensatory damages. The sole evidence of record dealing with Gutierrez's mental suffering or emotional anguish consists of his own testimony regarding his elevated blood pressure. This evidence suggests that Complainant was unaware he had elevated blood pressure until his annual LANL-provided physical (TR 198), and that he was also unaware that he was under stress (TR 199). At the time of the hearing, Gutierrez was not under the care of a physician for his emotional stress (TR 198). He had not taken any sick days for stress (TR 316), and was only seen three times to check his high blood pressure (TR 316-17). There is no evidence that Gutierrez took medication to control his blood pressure. Most importantly, absent medical or other competent evidence that the Complainant suffered from high blood pressure that was

causally related to the unfavorable personnel actions the Respondent took, we hold that he failed to meet his burden of proving a causally-related condition, even under the generous evidentiary standards of 29 C.F.R. § 24.6(e) ("[f]ormal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied. The administrative law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious").

Other than his high blood pressure, Gutierrez offered no evidence of non-monetary losses. At the hearing, Gutierrez virtually withdrew any clam for emotional distress when he testified: "as fara as emotional distress, I mean you know I'm just asking for consideration. I'm not going to press this issue." TR 381. This paucity of evidence is in sharp contrast to the facts in *Lederhaus*, where the Secretary found the testimony of witnesses demonstrated that "Lederhaus was subjected to an ordeal over a period of five and one half months as a consequence of Respondent's illegal actions." *Lederhaus*, electronic slip op. at 7. Lederhaus was without a job for five and a half months, was constantly harassed by bill collectors, and had foreclosure proceedings begun against his house. Lederhaus was depressed, angry, difficult to deal with and contemplated suicide. Based upon these facts, which testimony from the Complainant's wife and neighbor corroborated, the Secretary awarded Lederhaus \$10,000 in compensatory damages.

Thus, we find that the evidence of record does not support any award of compensatory damages, and we reverse the ALJ's recommendation.

III. Amount of Attorney's Fee Award

Finally we consider the ALJ's award of attorneys' fees and costs in the amount of \$49,104.37. When the Secretary grants relief under the Act, the Secretary

at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined, by the Secretary, for or in connection with, the bringing of the complainant upon which the order was based.

42 U.S.C. § 5851(2)(B).

The Secretary employs the lodestar method to calculate attorneys' fees, which requires multiplying the number hours reasonable expended in bringing the litigation by a reasonable hourly rate. *Jenkins v. United States Environmental Protection Agency*, No. 92-CAA-6, electronic slip op. at 2 (Sec'y Dec. 7, 1994), *citing Hensly v. Eckerhart*, 461 U.S. 424, 433 (1983). Under the ERA, unlike other whistleblower statutes, "even if a complainant does not ultimately receive compensatory damages or other particular relief which is sought, it would not be proper for the Secretary to deny fees and expenses unless he determines first that they were not 'reasonably incurred.'" *Deford v. Sec'y of Labor*, 700 F.2d 281, 288 (5th Cir. 1983).

The party seeking a fee award must submit evidence documenting the hours worked and the rates claimed. If the documentation of hours is inadequate, the award may be reduced accordingly. *Hensley v. Eckerhart*, 461 U.S. at 433. We have held that a "complainant's attorney fee petition must include 'adequate evidence concerning a reasonable hourly fee for the type of work the attorney performed and consistent [with] practice in the local geographic area,' as well as records identifying the date, time, and duration necessary to accomplish each specific activity, and all claimed costs." *Fabricius v. Town of Braintree/Park Dept.*, ARB No. 97-144, ALJ No. 1997-CAA-14, electronic slip op. at 8 (ARB Feb. 9, 1999), citing *Ban Der Meer v. Western Kentucky Univ.*, ARB No. 97-078, ALJ No. 1995-ERA-38 (ARB Apr. 20, 1998).

Here, the complaint has submitted a fully itemized and documented fee petition. The ALJ who presided over the hearing carefully evaluated the fee petition and found:

I find the level of detail in the descriptions of the services provided to be adequate, especially in light of this Administrative Law Judge's familiarity with the facts and issues involved in the underlying claim. To require a greater degree of specificity would impose an unnecessary and onerous burden, beyond the scope needed by this Administrative Law Judge to reach a determination.

R.D.&O. II, slip op. at 3-4.

Following our own review of the parties' submissions, we find no basis for disturbing the ALJ's award of attorneys' fees and costs. We have also considered the fact that we have reversed the award of compensatory damages, and thereby substantially reduced the degree of Gutierrez's success on the monetary aspects of his claim. Nevertheless, he achieved significant remedies and remains the prevailing party, and so we decline to make a downward adjustment for work performed on the now-unsuccessful claim for emotional distress. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) (holding attorneys' fees should not be reduced simply because plaintiff failed to prevail on every contention raised, where plaintiff obtains otherwise an excellent result). *Cf. Pogue v. U.S. Dept. of the Navy*, No. 87-ERA-21, electronic slip op. at 14 (Sec'y Apr. 14, 1994) (Labor Secretary rejected respondent's challenge to an award of attorneys' fees award in case where, although no damages were awarded, the Complainant was more than minimally successful, because the Secretary found a violation of the CERCLA and because discriminatory disciplinary actions were ordered expunged and Complainant was awarded a retroactive within grade increase, transfer to a comparable job and training).

We thus affirm the ALJ's award of attorney's fees.

CONCLUSION

For the reasons discussed in this decision we **AFFIRMED** the ALJ's finding that LANL violated the Act, and adopt the ALJ's recommended award of relief consisting of a retroactive 4% salary increase, reimbursement of used vacation days, expungement of the negative comment from the performance evaluation and an award of attorneys' fees and costs in the amount of \$49,104.37. We **REVERSE** the ALJ's recommendation of compensatory damages in the amount of \$15,000 and make no award of compensatory damages.

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It is further **ORDERED** that the Complainant shall have 20 days from the date of this Decision and Order to submit to this Board an itemized petition for additional attorneys' fees and other litigation expenses incurred on or after June 10, 1999. The Complainant shall serve the petition on the Respondent, who shall have 30 days after issuance of this Decision and Order to file objections to the petition with this Board.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

[ENDNOTES]

¹ Citations to the record are as follows: Recommended Decision and Order (R.D.&O. ____); Recommended Decision and Order Approving Attorneys' Fees (R.D.&O. II ____); Administrative Law Judge Exhibit (AEX ____); Hearing Transcript (TR ____); Joint Exhibit (JEX ____); Complainant Exhibit (CEX ____); Respondent Exhibit (REX ____).

² The R.D.&O. and R.D.&O. II are available at the Office of the Administrative Law Judges' website <http://www.oalj.dol.gov/public/wblower/refrnc/eralist5.htm>.

³ The Secretary of Labor has delegated authority and assigned responsibility to this Board to act for her in issuing final agency decisions on questions of law and fact arising in review or on appeal under the whistleblower provisions of the environmental acts. Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

⁴ The electronic slip opinions cited in this decision are available at <http://www.oalj.dol.gov/libwhhist.htm>.